

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAQUEL VOGT	)	CIVIL ACTION
	)	
v.	)	
	)	
TIME WARNER ENTERTAINMENT	)	
COMPANY, L.P., d/b/a Home Box Office,	)	
Inc., and COMCAST CABLE	)	No. 01-905

**MEMORANDUM**

**Padova, J.**

**April, 2001**

The instant matter arises on Defendant Comcast Cable Communications, Inc.'s Motion to Dismiss and Plaintiff Raquel Vogt's Motion to Remand. For the reasons that follow, the Court concludes it lacks subject matter jurisdiction, and therefore grants Plaintiff's Motion and remands the case to the Court of Common Pleas for Philadelphia County. <sup>1</sup>

**I. Background**

Plaintiff Raquel Vogt ("Vogt") is a professional dancer who was working the night that Defendant Time Warner Entertainment Company, L.P., d/b/a Home Box Office and Home Box Office, Inc. ("HBO") was filming for its television program "G-String Divas: First Time Divas." Plaintiff alleges that HBO misappropriated her image by filming and broadcasting her stripping performance as part of its program without her permission. Plaintiff also brings a misappropriation claim against Comcast Cable, which broadcast the program.

Plaintiff filed the instant action in the Court of Common Pleas for Philadelphia County.

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<sup>1</sup>In light of the Court's conclusion that it lacks subject matter jurisdiction over the matter, the Court dismisses Defendant's Motion to Dismiss as moot.

Although Comcast Cable is a Pennsylvania citizen, and therefore non-diverse, Defendants assert that Comcast was fraudulently named in this action, and that it should be dismissed from the case. Without the presence of Comcast Cable in the case, diversity of the parties would exist.

## **II. Legal Standard**

“When a non-diverse party has been joined as a defendant, then in the absence of a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined.” Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992). A party fraudulently joined by a plaintiff may not defeat removal jurisdiction. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921). A removing party who asserts that a defendant is fraudulently joined carries a “heavy burden of persuasion.” Id.; see Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990); Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1012 n.6 (3d Cir. 1987). Joinder is fraudulent where “there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment.” Boyer, 913 F.2d at 111 (quoting Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir. 1985) (citations omitted)). If the court finds that “there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants,” then the court must find joinder proper and remand the action. Batoff, 977 F.2d at 851 (citations omitted). Where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on the merits of those claims or defenses. Boyer, 913 F.2d at 113. In evaluating a claim of fraudulent joinder, the court must (1) “focus on the complaint at the time the petition for removal was filed;” (2) “assume as true all factual

allegations of the complaint;” and (3) “resolve any uncertainties as to the current state of controlling substantivelawinfavorofthepointiff.” Id.at851-52.

“[W]hile issues of liability may not ordinarily be determined on a motion to remand, it is well settled that upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal.” Smoot v. Chicago, Rock Island & Pacific R.R. Co., 378 F.2d 879, 881-82 (10th Cir. 1967). However, such piercing must be limited to circumstances, such as in Smoot, where the Court reached outside the pleadings to consider an affidavit that completely divorced the challenged defendant from the allegations and left no doubt that the defendant was improperly joined. Lyall v. Airtran Airlines, 109 F.Supp.2d 365, 368 n.8 (E.D.Pa.2000)

### **III. Discussion**

Plaintiff filed this suit alleging invasion of privacy/misappropriation claims against HBO, the entity that filmed and produced the video, and Comcast Cable, the entity that broadcast the program. Comcast Cable contends that Plaintiff “fraudulently joined Comcast in this action by asserting baseless claims against it in a transparent attempt to defeat this Court’s diversity jurisdiction. Def.’s Mot. to Dismiss at 1. Joinder may be deemed fraudulent if the plaintiff fails to state a cause of action against the resident defendant, and the failure is obvious according to the settled rules of the state. Boyer, 913 F.2d at 112.

Defendant Comcast originally moved to dismiss the Complaint against it on the grounds that the factual allegations in the Complaint established nothing more than that Comcast was a “passive conduit” of material, and that such a claim was barred by the First and Fourteenth Amendments to the Constitution. Def.’s Mem. at 4. Defendants’ Omnibus Response to Plaintiff’s Motion to Remand

essentially incorporates that argument in the context of its “fraudulent joinder” claim, upon which removal was based.<sup>2</sup>

An inquiry into the validity of a complaint triggered by a motion to dismiss under Rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder. It is possible that a party is not fraudulently joined, but that the claim against that party ultimately is dismissed for failure to state a claim upon which relief may be granted. Batoff, 977 F.2d at 852. The test is whether the plaintiff’s claims are not even “colorable,” which is to say, “wholly insubstantial and frivolous.” Lyall v. Airtran Airlines, 109 F. Supp. 2d 365, 368 (E.D. Pa. 2000). “Consequently, if [the court] must make a penetrating or intricate analysis of state law in order to determine if the claim is colorable then it is likely that the claim is indeed colorable and not frivolous.” Id.

In the instant case, Plaintiff characterizes her claim against Comcast Cable as a “right of publicity” tort. To determine if Plaintiff has stated a colorable claim for appropriation, the Court looks to the Restatement (Second) of Torts, which has been cited by the Supreme Court of Pennsylvania. See Fanelle v. LoJack Corp., 79 F. Supp. 2d 558, 563-64 (E.D. Pa. 2000) (citing Marks v. Bell Telephone Co., 331 A.2d 424, 430 (Pa. 1975)); see also Jenkins v. Bolla, 600 A.2d 1293, 1295-96 (Pa. Super. Ct. 1992). Under the Restatement, “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” Restatement (Second) Torts § 652C. Appropriation is grounded in the property right of an individual in the exclusive use of his own identity, the so-called “right of publicity.” See id. cmt. a.

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<sup>2</sup>Defendant Comcast filed the Motion to Dismiss on its own behalf. In response to Plaintiff’s Motion to Remand, the Co-Defendants filed a joint, omnibus response. Doc. No. 9.

The use or benefit at issue in an appropriation claim is typically a commercial use of a persons' name or likeness. Fanelle, 79F.Supp.2dat564.

The Court concludes that Plaintiff's has presented a colorable claim against Comcast. Plaintiff alleges that the HBO program used Plaintiff's image (the tape of her performance) without her permission. Further, Plaintiff alleges that Comcast broadcast the program, and thus that Comcast took part in the tortious conduct. It is not clear that Plaintiff's pleading would be sufficient to sustain the claim against Comcast under Rule 12(b)(6); however, the only question properly before the Court at this juncture is whether Plaintiff has a colorable claim in state court.<sup>3</sup> Though Comcast may indeed be able to assert a valid "passive conduit" and/or First Amendment defense to the claims against it, this Court cannot, in examining defendant's fraudulent joinder allegation, make a determination on the merits of such a defense in order to determine that the joinder of Comcast in this litigation is improper.<sup>4</sup> See Lyall, 109F.Supp.2dat368.

The Court takes no position with respect to the merits of Defendant Comcast's various defenses to the claims made by Plaintiff, or to the adequacy of Plaintiff's pleadings on that count. For the reasons already stated, the Court cannot conclude that Plaintiff's joinder of Comcast as a defendant in this action was fraudulent. As such, diversity does not exist, and therefore this Court lacks subject matter jurisdiction over this action. The Court grants Plaintiff's Motion to Remand, and

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<sup>3</sup>The Court notes that Defendants here do not assert the presence of any "indicia of fraudulent joinder," as was presented to the United States District Court for the Eastern District of California in Lewis v. Time Inc., 83F.R.D.455 (E.D.Cal.1979), the case cited by Defendants in their brief. See id. at 458.

<sup>4</sup>Neither does the fact that federal constitutional claims are or may be implicated in a defense, even meritoriously, give the Court subject matter jurisdiction over the claims. See Sprague v. Bulletin Co., 527F.Supp.1016, 1017 (E.D.Pa.1981) (citing Louisville & Nashville R.Co.v.Mottley, 211 U.S.149, 152 (1908)).

remands the case to the Court of Common Pleas of Philadelphia County. The Court further dismisses Defendants' Motion to Dismiss as moot. An appropriate Order follows.

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**ORDER**

**AND NOW**, this day of April, 2001, upon consideration of Plaintiff's Motion to Remand (Doc. No. 7), and any responses thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**, and the above-captioned case is **REMANDED** to the Court of Common Pleas for Philadelphia County. **IT IS FURTHER ORDERED** that:

1. Plaintiff's Motion for Leave to File Reply (Doc. No. 10) is **DISMISSED** as moot.
2. Defendant's Motion to Dismiss (Doc. No. 4) is **DISMISSED** as moot.

BY THE COURT:

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John R. Padova, J.